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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. **77-756**

ODESSA JOHNSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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OPINION BELOW

Petitioner, Odessa Johnson, hereby applies for a writ of certiorari directed to the United States Court of Appeals for the Sixth Circuit to review the judgment rendered by said court in the above entitled cause. The opinion of the Court of Appeals herein is appended hereto and designated as Appendix "A" to this petition.

JURISDICTION

The judgment of the Court of Appeals in the instant matter was entered November 1, 1977. A petition for rehearing was timely filed by petitioner but to date has not been ruled on. This petition is being filed at the present time to comply with the time limits prescribed in Rule 22, paragraph 2, of the Rules of The Supreme Court. The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28, United States Code § 1254(1).

QUESTION PRESENTED

A single question is raised herein. Did petitioner receive effective assistance of counsel during the trial court proceedings in the instant case?

NATURE OF CASE

Petitioner was charged in the present matter with possession of a controlled substance with intent to distribute same in violation of Title 21, United States Code, § 841(a)(1). Under the facts of

the case (to be presented below), the sole defense available to petitioner was a motion for suppression of evidence under Rule 41(e), Federal Rules of Criminal Procedure. Such motion was made by a co-defendant in the case and joined in by petitioner. The representation of petitioner by her counsel on the motion, or the essential lack of it, poses the question presented above. The issue arises under the Sixth Amendment to the United States Constitution.

FACTS OF CASE

Petitioner and co-defendant Genetta Braud were arrested October 18, 1975 by federal drug enforcement officers at the Detroit Metropolitan Airport. Surveillance by the officers there the preceding two days had resulted in the arrest of petitioner's sister in possession of a substantial quantity of contraband drugs. Attention was directed to petitioner upon her arrival at the airport on a flight from Los Angeles because of her resemblance to her sister. Petitioner and Braud were observed to walk to various

areas of the airport, at times remaining together and at times separating. They were then followed to the airport hotel where Braud rented room 330. The two women went up to the room together and a few minutes later were observed leaving the room carrying all items which they previously had with them and dressed the same as before. Neither had retrieved any luggage to this point.

At this time Braud ran to the American Airlines ticket counter and got in line. A nonstop flight to Los Angeles was scheduled to leave approximately ten minutes later. Petitioner was observed to meet a man at the baggage claim area and retrieve her luggage, which included a suitcase appearing to be the mate of one carried by petitioner's sister when she was arrested the preceding day. Petitioner and the man with her then left the airport in a car. A check of the vehicle revealed it to be registered to petitioner's sister.

One of the officers returned to the hotel and had the manager check to see if room 330 was occupied. The manager

knocked loudly on the door and received no response. He then opened the door with a passkey, and he and the officer entered the room. The room appeared untouched except for the bed which had been turned down. The officer searched the room and under the mattress found the contraband subject of this case. He then went to the American Airlines ticket counter where he arrested Braud who was in process of buying a one-way ticket to Los Angeles. Petitioner was subsequently arrested and advised of her constitutional rights. The next morning, enroute to arraignment, she voluntarily and without being questioned stated that she had hired Braud to transport the contraband for her and that the man arrested with her was not involved in the matter.

The foregoing in substance constituted the evidence presented at the hearing of the motion to suppress evidence and is contained in the Appendix filed with the appeal at pages 41 to 87. No dispute with these facts is presented herein. It was also elicited at the hearing of the suppression motion that Braud did not have

the hotel room key in her possession when arrested and to the knowledge of the officer the key was never found. (Appendix on Appeal, pp. 66-67.) However, the Government's own brief filed in response to the suppression motion reflected that the key was found in petitioner's purse at the time of her arrest. (Appendix on Appeal, p. 19.)

PETITIONER'S POSITION

Petitioner submits that only one line of defense to the charge in the indictment was available to her. In view of her untainted confession, she could not reasonably be expected to prevail on the substance of the case. A motion to suppress the evidence was thus her single defense.

To prevail on the motion two circumstances required the attention and consideration of her trial counsel. The first, indeed, was prerequisite to initiation of the motion, establishing petitioner's standing to contest the hotel room search in the case. The second circumstance manifested itself in the Government's claimed justification for the search,

reliance on the theory of abandonment. (Appendix on Appeal, pp. 20-21.) It was thus essential for counsel to show, for the suppression motion to succeed, that petitioner not only had an interest in the hotel room and contraband in the first instance but that she retained and did not abandon that interest prior to the search.

Can an attorney who fails to recognize the foregoing issues in the case or to develop and present the available defense evidence on those issues be deemed to have provided effective assistance of counsel under the Sixth Amendment? The simple answer, under the case authorities, is that he cannot.

DISCUSSION

A

Pertinent Law

The denial to a defendant in a criminal action of effective assistance of counsel, whether court appointed or privately retained, taints the proceedings and invalidates a resultant conviction.

McMann v. Richardson,

397 U.S. 759, 90 S.Ct. 1441,

25 L.Ed.2d 763 (1970);

United States v. Carr,

459 F.2d 16 (C.A. 7, 1972);

United States v. Hammonds,

425 F.2d 597 (C.A.D.C. 1970).

The acceptance of the foregoing principle of constitutional jurisprudence is universal in our courts, both federal and state. Its application to particular cases, however, often presents a problem. Even the terminology used to describe the rule is variable. (See discussion of issue in United States v. Hammonds, supra.) However, certain basic precepts can be distilled which have pertinence to the case at bar.

Thus, our Chief Justice has formerly declared, while a Circuit Judge, respecting the duty of trial counsel:

"The lawyer engaged in defense of an accused should be - and should be recognized as - a professional advocate with a highly important but none the less limited function, i.e., limited

and circumscribed by the rules of the system and the ethics of the profession. At the trial stage his duty is to put the prosecution to its proof, to test the case against the accused, to insist that the procedural safeguards be followed and to put forward evidence which is valid, relevant and helpful to his client

In short he is to 'put his client's best foot forward.'"

Johnson v. United States,

360 F.2d 844 (concurring opinion at p. 846) (C.A. D.C. 1966).

And Judge Burger has also recognized (in a dissenting opinion) that a basis for reversal of a conviction exists and may be grounded:

"on ineffective assistance of counsel for failing to press an essential or central element of defense."

Clark v. United States,

259 F.2d 184, 186-187, (C.A.D.C. 1958).

To the same effect as the foregoing, the court in United States v. Easter, 539 F.2d 663 (C.A. 8, 1976), has more recently stated:

"It is fundamental, we think to afford a defendant a fair trial on a criminal charge, that his counsel assert that which may be his only defense. This is particularly true when that defense has a factual basis and there is a recognized and obvious means to suppress evidence which has allegedly been illegally seized." 539 F.2d at p. 666.

In Easter, the court determined that trial counsel's failure to pursue a motion to suppress evidence on grounds of illegal search and seizure, where it was available under the facts and law and in effect constituted defendant's primary defense in the case, rendered the representation given constitutionally inadequate. Similar rulings have been rendered in state courts, e.g. People v. Ibarra, 60 Cal.2d 460, 34 Cal.Rptr. 863 (1963).

In this connection the California Court of Appeal has succinctly declared:

"To this end [effective assistance of counsel] it is the minimal duty of counsel to carefully investigate all possible defenses of fact and law that may be available to the defendant. Where counsel's failure to do so results in the failure to assert crucial and dispositive defenses, the defendant has been denied his constitutionally guaranteed right to the effective assistance of counsel." [Citing, inter alia, Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)] People v. Gayton,

10 Cal.App.3d 178, 182,
88 Cal.Rptr. 891 (1970).

B

Application To Case At Bar

In the present case precisely what has been condemned in the cited cases transpired. It is true that petitioner's trial counsel did join in the motion of the co-defendant to suppress evidence, but counsel's pursuit of that motion was perfunctory and pro forma. It had as little effect in the final analysis as counsel's failure to act in Easter and Ibarra, and it similarly constituted ineffective representation.

Trial counsel's deficiency rests in two areas: his initial failure to establish petitioner's interest in the premises searched or property seized, and his failure to show her retained interest prior to the search. The most cursory examination of the law would have reflected the need for such proof; the most minimal investigation of the facts would have revealed a factual predicate for the proof.

Petitioner had related to the federal officers shortly after her arrest her

principal responsibility for the contraband in the case and that she had merely used the co-defendant to carry the item for her. Moreover, she in fact knew about her sister's arrest the day before and was concerned lest she be similarly arrested. Thus, the rental of the hotel room followed as a means of temporarily securing the contraband and to enable petitioner to return later when it was safe to retrieve the material. To this end petitioner retained the hotel key.

The full circumstances of petitioner's situation were subsequently offered by her by way of affidavit on a motion to augment the record and for reconsideration of the motion to suppress evidence. (Present counsel had been retained for this proceeding.) A verbatim copy of said affidavit is appended hereto as Appendix "B" and the same appears at pages 24-25 of the Appendix on Appeal. While the total substance of the affidavit had not been related to the federal officers, its content was clearly consistent with the established facts and manifestly not a recent fabrication.

Thus, trial counsel was in a position to know that in fact petitioner had an interest in the hotel room searched and contraband seized in this case and that in fact she had not relinquished or abandoned that interest prior to the search. And clearly he should have known that under well settled law it was his responsibility to establish such retained interest as a prerequisite to prevailing on the motion. To fail to present the available and pertinent evidence in this connection was tantamount to not making the motion in the first instance, since the motion could not succeed otherwise.

The applicable law in this regard, on the issue of standing to contest the search, is amply stated in Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), and Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). For counsel not to adduce available evidence to satisfy this requirement is derelict. Yet, in its opinion, the Court of Appeals concluded that petitioner, who did not testify, failed to establish her requisite interest

and consequent right to contest the search.

Similarly, the law respecting the issue of abandonment is plainly stated in reported decisions and involves the actual, not the apparent, intent of the possessor of the property. See, United States v. Moody, 485 F.2d 531 (C.A. 3, 1973); United States v. Wilson, 472 F.2d 901 (C.A. 9, 1973). Even the trial judge correctly acknowledged that abandonment was a matter of intent and not determined by the beliefs of the officers involved. (Appendix on Appeal, p. 85) For counsel, then, not to adduce available evidence to show petitioner's intent to return for her property, which, albeit contraband, had substantial value, is likewise derelict.

Trial counsel's dereliction in the above particulars can only be attributed to his unfamiliarity with the law of the case or the facts. In this regard, the comments of the court in Caraway v. Beto 421 F.2d 636 (C.A. 5, 1970), appear appropos:

"Certainly, an attorney cannot render reasonably effective

assistance unless he has acquainted himself with the law and facts of the case."

421 F.2d at p. 637.

Such admonition, it is submitted, is fully applicable to and descriptive of trial counsel herein.

On the available facts and under the applicable law, petitioner had a substantial defense to the charge in the indictment. The essence of this defense, however, was "blotted out" because of trial counsel's inadequacy. Scott v. United States, 427 F.2d 609, 610 (C.A. D.C. 1970). Even more disturbing, on the question of effective assistance of counsel, it was petitioner's only defense in the case. Clearly, she did not have her day in court.

C

Conclusion

No task is more unpleasant or difficult than to assail other counsel on the grounds of ineffective and inadequate legal representation accorded a defendant

in a criminal case. Nor is the task lightly assumed here. The standard for constitutional competency of counsel, it is acknowledged, is not that of success or error free representation. But it does encompass, under the authorities cited, the recognition and presentment of essential and critical defenses. An attorney who fails to do so because of unawareness of the pertinent facts or law, and who thus creates a record, as found by the Court of Appeals in its opinion below, barren of necessary and available defense evidence, cannot be deemed to have measured up to the requisite standard.

It is recognized that the sustaining of petitioner's position herein may result, on remand, in the suppression as evidence of a significant quantity of , contraband; but the proscriptions of the Fourth Amendment and the mandate of the Sixth do not turn on the size of a case or the quantum of evidence involved. Rather, in such cases, the courts must be all the more diligent in protecting the rights of the accused to avoid the imposition of punitive sanctions when those

rights have been violated or denied.
Such action, it is urged, is called for
in the instant case.

APPLICATION

It is respectfully requested, on the
basis of the arguments presented and the
authorities cited hereinabove, that the
within petition for writ of certiorari
be granted and the matter set for hearing
on this Honorable Court's docket.

Respectfully submitted,
HOWARD E. BECKLER
Attorney for Petitioner

APPENDIX "A"

77-5111

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

V.

ODESSA JOHNSON,
Defendant-Appellant /

FILED
NOV 1 1977

JOHN P.
HEHMAN, Clerk

O R D E R

Before: CELEBREZZE and ENGEL, Circuit
Judges and WALINSKI, District
Judge*

The initial issue in this appeal is whether the trial judge erred in overruling appellant Johnson's motion to suppress a cache of heroin found in an airport hotel room, which the government claimed had been rented by a companion and then abandoned. Upon a consideration of all of the evidence, the court is of the opinion that appellant, who did not testify, failed to establish her standing to contest the search of the premises

*The Honorable Nicholas J. Walinski, Judge United States District Court for the Northern District of Ohio, sitting by designation.

involved and that the district court did not err in any event in determining that the same were abandoned at the time of the search and seizure.

Finally, we conclude that appellant failed to establish that her counsel at the suppression hearing rendered ineffective assistance in violation of the Sixth Amendment. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

AFFIDAVIT OF ODESSA JOHNSON

COUNTY OF LOS ANGELES)
) ss.
STATE OF CALIFORNIA)

I, ODESSA JOHNSON, being duly sworn,
declare and depose as follows:

1. I am a defenant in case number 5-81822 pending in the United States District Court before the Honorable Philip Pratt, United States District Judge.

2. At the proceedings held on March 18, 1976 to suppress evidence in said case the following information and facts known to me were available to be presented but were not elicited.

3. Such information and facts are pertinent to the issues raised in the proceedings and are now offered for consideration.

4. At the time of my arrest on October 18, 1975 I had in my possession the key to room 330 at the Host Hotel located at Metropolitan Airport in Detroit, Michigan. This key was removed from my possession and retained by the arresting federal officers.

5. Room 330 at the Host Hotel was rented by Genetta Braud at my direction

for the purpose of temporarily leaving hidden in the room a quantity of heroin of substantial value to be retrieved by me later the same evening.

6. This procedure was employed to avoid my arrest on deplaning at Metropolitan Airport with the heroin as had my sister, Elinora Stephens, the day preceding. It was my intention, therefore, to have the hotel room rented, hide the cache inside the room in order to secure it, retain the hotel room key for later access, have Genetta Braud leave for Los Angeles, exit the airport area myself, and return subsequently when it was safe to do so to retrieve the contraband.

7. The hotel room was rented and paid for for one day, and I therefore had until the following morning's check-out time to return to the room and accomplish my purpose.

8. At no time did I intend to abandon the hotel room while the narcotics remained inside the room; and it was never my intention to abandon and thereby lose the substantial value in contraband which I placed there.

9. At all times until my arrest I intended to return to the hotel room, prior to check-out time the next morning, use the key in my possession to gain access, and secure the heroin in question.

/s/ Odessa Johnson
ODESSA JOHNSON

Sworn and subscribed to
before me this 1st
day of November, 1976.

/s/ D. E. Stevens
Notary Public

OFFICIAL SEAL
D. E. STEVENS
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 6, 1980